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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

JAMES CALLARI,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

SUE L. WISE
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Counsel for Petitioner

November 19, 1984

QUESTIONS PRESENTED

1. Whether the Connecticut Supreme Court's ruling that the defendant lacked standing to challenge the warrantless search of a home where he had been an overnight guest for several days violated his right to be free from unreasonable search and seizure.

2. Whether the Connecticut Supreme Court's ruling that the police were justified, under the plain view doctrine, in forcibly opening the defendant's locked suitcase, without a search warrant, denied the defendant freedom from unreasonable search and seizure.

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
I THE DECISION OF THIS COURT IN PAYTON V. NEW YORK, 445 U.S. 573 (1980) AND STEAGALD V. UNITED STATES, 451 U.S. 204 (1981) HAVE LEFT UNRESOLVED THE CRUCIAL FOURTH AMENDMENT QUESTION OF WHETHER AN OVERNIGHT GUEST IN A PRIVATE RESIDENCE ENJOYS A REASONABLE EXPECTATION OF PRIVACY AND THUS THE SAME RIGHTS AS THE HOST HOME OWNER TO BE FREE FROM WARRANTLESS ENTRIES, SEARCHES AND SEIZURES	9
II THE DECISION OF THE CONNECTICUT SUPREME COURT DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN UNITED STATES V. CHADWICK, 433 U.S. 1 (1977)	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Arkansas v. Sanders
442 U.S. 753 (1979).....14

Coolidge v. New Hampshire
403 U.S. 443 (1971).....13

Payton v. New York,
451 U.S. 204 (1981).....9-12

Rakas v. Illinois
429 U.S. 128 (1978).....11

Rawlings v. Kentucky
448 U.S. 98 (1980).....12

Riddick v. New York
451 U.S. 204 (1981) 10

Steagald v.United States
451 U.S. 204 (1981).....10,12

Texas v. Brown
460 U.S. 730 (1984).....13

United States v. Bulman
667 F.2d 1374 (11th Cir. 1982)....11

United States v. Chadwick
443 U.S. 1. (1977).....13-15

United States v. Payner
447 U.S. 727 (1980).....11

United States v. Place
462 U.S. , 103 S.Ct 2637 (1983)..14

United States v. Ross
456 U.S. 798 (1982).....14

United States v. Salvucci
448 U.S. 83 (1980).....12

Walter v. United States
447 U.S. 649 (1980).....14

Welsh v. Wisconsin
U.S. , 104 S. Ct. 2091 (1984)..10

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, JAMES CALLARI, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on JULY 24, 1984.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 194 Conn. 18 (1984) and appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on July 24, 1984. A timely motion to reargue was not filed by the Office of the Public Defender. A motion for permission to file a motion to reargue was denied by that Court on September 26, 1984, and the petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Connecticut Supreme

Court's ruling that the defendant lacked standing to challenge the warrantless search of a home where he had been an overnight guest for several days violated his right to be free from unreasonable search and seizure.

2. Whether the Connecticut Supreme Court's ruling that the police were justified, under the plain view doctrine, in forcibly opening the defendant's locked suitcase, without a search warrant, denied the defendant freedom from unreasonable search and seizure.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants

shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTE, SEC. 19-480(a) provided, in pertinent part: PENALTY FOR ILLEGAL MANUFACTURE, DISTRIBUTION, SALE, PRESCRIPTION OR ADMINISTRATION BY NON-DRUG-DEPENDENT PERSON....

(b) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person...one kilogram or more of a cannabis-type substance..., and who is not at the time of such action a drug-dependent person, for the first offense shall be imprisoned not less than five years nor more than twenty years....The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended...

STATEMENT OF THE CASE

James Callari, the petitioner here, was convicted in the Connecticut Superior Court of possession of more than one kilogram of

marijuana.

On November 12, 1976, Mr. Callari was an overnight guest at the rural Connecticut home of Michael Brady. Mr. Callari, a resident of New Jersey, had been the social guest of the Brady's for one or two night previous and intended to stay another night. (10/6/78 Tr. pp. 252-255, 357-358) Mr. Callari and Michael Brady were arrested, in a red pick-up truck, a considerable distance from the Brady home, at 12:05 a.m. (10/6/78 Tr. pp. 202-206)

Subsequent to this arrest, in the early morning hours, several Connecticut State Troopers went to the Brady residence, and, without a warrant, gained entry. THe troopers searched throughout the residence; in an upstairs bedroom which had

been occupied by Mr. Callari, Hurley found a heavy, locked suitcase. Hurley claimed that he saw, in plain view, a plastic bag with plant material protruding from the locked suitcase. Hurley seized the suitcase and forcibly opened it with a screwdriver or a knife. Hurley claimed that after he forced the suitcase open, Mrs. Brady told him the suitcase and its contents of clothing and marijuana, belonged to the "guy from New Jersey." (9/15/78 Tr. pp. 212-215)

At the trial of Michael Brady, in early summer of 1978, the trial court suppressed all evidence seized against Michael Brady, on the grounds that the State police lacked the consent necessary to conduct a warrantless search of the Brady residence. At the Callari trial, in the fall of the

same year, the defendant, before a different Superior Court judge, moved to suppress the contents of the suitcase. The trial court ruled, contrary to the ruling in the Brady trial, that the consent was valid. (10/6/78 Tr. pp. 398)

Callari was convicted and sentenced to a five year mandatory minimum term of imprisonment.

Callari appealed this conviction to the Connecticut Supreme Court claiming that the doctrine of collateral estoppel should have precluded the Callari trial judge from upholding the validity of the consent to search. He further claimed that the warrantless seizure and opening of the locked suitcase violated his rights under the Fourth Amendment.

The Connecticut Supreme Court found no

error in the trial judge's refusal to suppress the seized marijuana and affirmed Callari's conviction. That court ruled that Callari, as a transient, overnight, social guest in the Brady home, had no legitimate expectation of privacy, and thus had no standing to challenge the warrantless search. That court further held that the forcible warrantless opening of the locked suitcase was proper under the plain view doctrine.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE THIS COURT IN PAYTON V. NEW YORK, 451 U.S. 204 (1981) HAVE LEFT UNRESOLVED THE CRUCIAL FOURTH AMENDMENT QUESTION OF WHETHER AN OVERNIGHT GUEST IN A PRIVATE RESIDENCE ENJOYS A REASONABLE EXPECTATION OF PRIVACY AND THUS THE SAME RIGHTS AS THE HOST HOME OWNER TO BE FREE FROM WARRANTLESS ENTRIES, SEARCHES AND SEIZURES

In Payton v. New York, 451 U.S. 204 (1981) and in the case decided

simultaneously, Riddick v. New York, this Court unequivocally held that warrantless searches and seizures within a home are presumptively invalid. This holding was expanded this last term in Welsh v. Wisconsin, U.S. , 104 S. Ct. 2091 (1984). Similarly, in Steagald v.United States, 451 U.S. 204 (1981) this Court held that the police, even when armed with a valid arrest warrant, may not enter the home of a third party, to search for the individaual named in the warrant, unless the warrant permits entry of the third party dwelling.

This Court, has not to date, however, decided the crucial question, of whether a person, who is a transient, overnight guest in another's home, has a reasonable expectation of privacy for himself or his belongings in that home. In United States

v. Bulman, 667 F.2d 1374 (11th Cir. 1982), the Court of Appeals held that a guest in a motel room, had under the rule of Payton, a reasonable expectation of privacy in that room even though he was not the owner, but a transient occupant.

In deciding this case, the Connecticut Supreme Court relied on United States v. Payner, 447 U.S. 727 (1980). This reliance is totally misplaced. In Payner, this Court held that Payner lacked standing to challenge the illegal seizure of documents taken from the briefcase of a bank officer. Rakas v. Illinois, 429 U.S. 128 (1978). It is axiomatic, that only one whose own constitutional rights have been violated may challenge a seizure.

In the case at bar, Mr. Callari, had standing to challenge the search of the

Brady residence because he was a guest in that home. He shares whatever legitimate expectation of privacy, the owner possesses and thus has standing to challenge the entry and the subsequent search. United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980).

Payton and Steagald have left this crucial question unresolved and the case at bar cries out for resolution of this all important issue.

II

THE DECISION OF THE CONNECTICUT SUPREME COURT DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN UNITED STATES V. CHADWICK, 433 U.S. 1 (1977)

In the case at bar the Connecticut Supreme Court ruled that the warrantless, forcible opening of the defendant's locked suitcase by the Connecticut State Police was justified under the plain view doctrine. Coolidge v. New Hampshire, 403 U.S. 443 (1971)

In so ruling, the Connecticut Supreme Court ignored the holding of this Court in United States v. Chadwick, 443 U.S. 1. (1977). The Connecticut court relied in so holding on Texas v. Brown, 460 U.S. 730 (1984) where this Court ruled that the police may seize containers in plain view.

The Connecticut court, however, completely ignored the cogent reasoning of Justice Stevens in his concurrence, that while the container may be temporarily seized without a warrant, "[i]t does not follow that the container may be opened on the spot."

This Court has always recognized the special privacy interests which an individual may possess in luggage. United States v. Chadwick, supra; Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Place, 462 U.S. , 103 S.Ct 2637 (1983); United States v. Ross, 456 U.S. 798 (1982). Similarly, this Court has ruled that sealed containers lawfully in the possession of the government do not justify the opening of the containers without a warrant, Walter v. United States, 447 U.S. 649 (1980) even when it is apparent that the

container may contain contraband. United States v. Chadwick, supra.

It is, of course, true that the contents of a container may be inferred from its outward appearance (as in this case, a plastic bag in which there was a green plant material). Nevertheless, the plain view appearance of contraband does not justify a forcible, warrantless search of luggage.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted:

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November 19, 1984

84-848 (2)

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APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

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_____

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APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A (Connecticut Supreme Court Decision)....1a-22a

APPENDIX B (Order Denying Permission to File A Motion to Reargue).....1b-2b

APPENDIX A
CONNECTICUT SUPREME COURT DECISION

STATE OF CONNECTICUT
v.
JAMES CALLARI
(9538)

SPEZIALE, C.J., PETERS, HEALEY, SHEA, and GRILLO, Js.

The defendant was charged with the crimes of possession of more than one kilogram of a cannabis-type substance with intent to sell by a person who is not drug dependent and of conspiracy to commit that crime. After he and another person, M, had been arrested, state police, with the consent of M's wife, conducted a warrantless search of M's residence. During that search, police seized items from the house and, on observing a plastic bag containing a green plant material which they suspected to be marihuana sticking out of a suitcase

belonging to the defendant, seized the suitcase and its contents as well. At his trial, M's motion to suppress the evidence in the defendant's trial had been presented, the trial court granted his motion to dismiss the conspiracy count and rendered judgement of conviction on the jury verdict of guilty on the possession count. On the defendant's later trial, a like motion to suppress was denied. After all of the evidence in the defendant's trial had been presented, the trial court granted his motion to dismiss the conspiracy count and rendered judgment of conviction on the jury verdict of guilty on the possession count. On the defendant's appeal to this court, held:

1. Because the defendant lacked

standing to challenge the warrantless search of M's residence, his claim that the resolution of the suppression issue at M's trial was, under the doctrine of collateral estoppel, dispositive of that issue at his trial was unavailing.

2. Because seizure of the material sticking out of the suitcase was justified under the plain view doctrine and because the police, having seen that material, were justified in opening the suitcase and seizing its contents, the trial court did not err in denying his motion to suppress.

3. The defendant's claim that the trial court, having dismissed the conspiracy count, should have instructed the jury to disregard evidence relative to that count was without merit; the defendant submitted no request for such a charge and he did not except the the charge given.

that count was without merit; the defendant submitted no request for such a charge and he did not except the charge given.

Argued May 3--decision released July 24, 1984

Information charging the defendant with the crimes of possession of more than one kilogram of cannabis-type substance with intent to sell by a person who is not drug dependent and of conspiracy to commit that crime, brought to the Superior Court in the judicial district of New London and tried to the jury before Spallone, J.; the defendant's motion to dismiss the conspiracy charge was granted; verdict and judgment of guilty of the possession charge and appeal by the defendant to this court; the state, with

permission of the trial court, cross appealed. No error.

Edward C. Lavalle, public defender, for the appellant (defendant).

C. Robert Satti, state's attorney, with whom was Michael L. Regan, for the appellet (state).

GRILLO, J. The defendant James Callari was charged in an amended substituted information with two counts: (1) possession of more than one kilogram of a cannabis-type substance with intent to sell by a person who is not drug dependent at the home of Mr. and Mrs. Michael E. Brady on November 12, 1976, in violation of General Statutes §19-480a(b),[1] and

[1] At that time, General Statues §19-480a provided: "PENALTY FOR ILLEGAL MANUFACTURE, DISTIBUTION, SALE, PRESCRIPTION

(2) conspiracy to commit that crime in violation of General Statues §§53a-48[2] and 19-480a(b).

---

provided: "PENALTY FOR ILLEGAL MANUFACTURE, DISTRIBUTION, SALE, PRESCRIPTION OR ADMINISTRATION BY NON-DRUG-DEPENDENT PERSON.

* * *

"(b) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marihuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance except as authorized in this chapter, and who is not at the time of such action a drug-dependent person, for a first offense shall be imprisoned not less than five years nor more than twenty year; and for each subsequent offense shall be imprisoned not less than ten years nor more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such a person was under

On September 15, 1978, on the date the trial was to begin, the defendant moved to suppress numerous items seized from the premises owned by the Bradys. After a full hearing, the court denied the motion. At the conclusion of the evidence at trial, the court granted the defendant's motion to dismiss the conspiracy count. The defendant was convicted on the first count of the information.

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the age of eighteen years or, (2) such person's mental capacity was significantly impaired by not so impared as to constitute a defense to prosecution."

[2] At that time, General Statues §53a-48 provided: "CONSPIRACY. RENUNCIATION. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an over act in pursuance of such conspiracy.

"(b) It shall be a defense to charge of conspiracy that the actor, after

On his appeal,[3] the defendant contends that the court erred: in failing to apply the doctrine of collateral estoppel to his motion to suppress; in denying his motion to suppress the seized evidence; and in failing to instruct the jury to disregard the evidence admitted to prove the second count following the dismissal of that count by the court. We find no error.

On the basis of evidence presented at the suppression hearing, the trial court might have found that the police were

---

conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

[3] On April 3, 1979, the state filed an appeal with this court citing as error the trial court's dismissal of the conspiracy charge. Since the state failed to brief this issue, we consider it abandoned. State v. Daniels, 180 Conn. 101, 104, 429, A.2d 813 (1980).

engaged in an investigation of a suspected drug operation at the Brady residence in Salem. Several days prior to November 12, 1976, state police Sgt. Richard Hurley and several state police troopers observed automobiles registered to known drug dealers entering and leaving the Brady residence. They stopped several vehicles and found bricks of marihuana therein. One of the vehicles was a red pick-up truck in which the defendant and Michael Brady were passengers. After a brick of marihuana was found in the truck, they and the driver were arrested to about 12:05 a.m. on November 13, 1976, and taken to state police barracks.

After Brady and the defendant were arrested and booked, Hurley, Sgt. William

Smith and Trooper Martin Hart returned to the Brady residence without a search warrant. Hurley and Smith went to the door and knocked. When Mrs. Brady answered the door, Hurley, who was in civilian clothes, identified himself, told Mrs. Brady that her husband had been arrested and that the police believed there were drugs in the house. Mrs. Brady invited the officers in to the kitchen. Hurley asked for her consent to search the house. Mrs. Brady granted the officer consent, first orally, then by signing a consent form.

Hurley went upstairs and looked into the rooms, including the one at the head of the stairs, allegedly occupied by the defendant. He saw a blue suitcase which,

to the best of his recollection at the hearing, was on the floor. He picked it up and placed it on the bed; it was fairly heavy. Sticking out of the right hand corner of the suitcase, there was a clear plastic baggie in which he saw a green plant material that he perceived to be marihuana. He asked Mrs. Brady to get a screwdriver or knife, then tapped the two clasps, opened the suitcase and found a considerable amount more of the green plant material. Hurley testified that he did not know whose suitcase it was, and that it was only after he opened it that Mrs. Brady indicated that the suitcase belonged to "the guy from New Jersey" (meaning the defendant who was from New Jersey). The suitcase and its contents,

as well as various other drugs and drug paraphenalia, were seized.

In court, Hurley identified the suitcase and its contents, including the plastic baggie with the green plant material and seven bricks of wrapped marihuana. He also identified photographs of the suitcase, the bricks and the baggie as they appeared shortly after the suitcase was opened, as well as photographs of the interior of the room in which the defendant had stayed for one or two nights prior to his arrest. The photographs, and the baggie and its contents were admitted into evidence at trial. At the request of defense counsel, Hurley demonstrated and described for the record how the suitcase appeared when he first saw it, fully

closed with a portion of the baggie and green plant material sticking out. A book containing drug records and a balance scale containing marihuana found in the basement were also admitted into evidence.

From the evidence at the suppression hearing, the trial court might reasonably have determined that the subject room in which the suitcase was found was used by the Bradys as well as by guest. Mrs. Brady kept her clothes, her husband's clothes, and familiar personal items in the room. The subject room, one of three rooms on the second floor, was to the ease side of a master bedroom. It was a combination of a junk room, a den and a bedroom. In it were strewn the belongings of many people who occupied the dwelling.

When the state police first entered the room on November 13, 1976, there was clothing on the bureau and floor, trash on the floor, and numerous items on the desk and floor including a woman's jacket, a suitcase, and a plastic bag. The closet in the room contained a dress, shirts, pants, a child's jacket and dress, and numerous items on the floor. The trial court could readily have found that the room was not being used exclusively by any one person. Cf. State v. Cochran, 191 Conn. 180, 463 A.2d 618 (1983).

Despite the evidentiary showing, the defendant claims that his motion to suppress the items seized at the Brady house should have been granted. It is conceded that at the earlier trial of

Michael Brady, the court, J. Shea, J., granted that defendant's motion to suppress. Thereafter, Brady was tried, convicted, and sentenced on June 29, 1978. The defendant in the present case now argues that since the court at the trial of Michael Brady suppressed the evidence seized from the hour, concluding that consent to search was not given, the decision on that issue is dispositive of the present matter before the court. He maintains that the doctrine of collateral estoppel prevents the suppression issue from being relitigated. We disagree.

The trial court at the trial of Michael Brady found that the police lacked the consent necessary to conduct a warrantless search of the Brady house.

The defendant in the present case, however, clearly has no standing to object to that search. The defendant bears the burden of establishing the facts necessary to demonstrate a basis for standing. State v. McLucas, 172 Conn. 542,546, 375 A.2d 1014, cert. denied, 434 U.S. 855, 98 S. Ct. 174, 54 L. Ed. 2d 126 (1977). Critical to this standing determination is the defendant's showing that he possessed a legitimate expectation of privacy in the premises searched. United States v. Payner, 447 U.S. 727, 731, 100 S. Ct. 2439, 65 L. Ed. 2d 468 reh. denied, 448, U.s. 911 101 S. Ct 25, 65 L. Ed. 2d 1172 (1980); State v. McLucas, supra. From the evidence introduced at trial, it is clear that the defendant has no such privacy

expectation. The defendant's status in the Brady house was at most that of a transient social guest. He slept in the subject room only one or two nights prior to his arrest. There is no evidence that any of his clothes were kept there or that he intended to stay in the room again. On the basis of these facts, the defendant has no expectation of privacy in the house, and thus lacks standing to challenge the validity of the search. See Payner v. United States, supra; State v. McLucas, supra. The defendant's motion for application of the doctrine of collateral estoppel was therefore properly denied.

Although the defendant cannot challenge the search of the house and

bedroom, he is not precluded form contesting the search of his suitcase, since by virtue of his ownership and the nature of the item, he possesses an expectation of privacy in it. Testimony in the present case reveals that the police found the defendant's locked suitcase on the bedroom floor. A baggie containing what was later found to be marijuana was sticking out of the corner of the suitcase. Seizure of this visible plant material was proper under the plan view doctrine. See Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 reh. denied, 404 U.S. 874, 92 S. Ct. 26, 30 L. Ed. 2d 120 (1971); State v. Altrui, 188 Conn. 161, 179, 448 A.2d 837 (1982). Police observation of this material led to a

decreased expectation of privacy by the defendant in the suitcase. See Arkansas v. Sanders, 442 U.S. 753, 764 n.13, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). The police were then justified in opening the locked suitcase and seizing any additional marihuana found inside. See Texas v. Brown, U.S. , 103 S. Ct. 1535, 1541, 75 L. Ed. 2d 502 (1983) (officer's expertise and totality of circumstances gave officer degree of certainty equivalent to plain view of contents of container, even though contents not visible). Thus, the defendant's claim that the trial court erred in denying his motion to suppress must fail.

The defendant's final claim that he court should have instructed the jury to

disregard certain evidence relative to the second count and removed that evidence from their consideration is similarly without merit. At the close of the evidence, the trial court granted the defendant's motion to dismiss the conspiracy count. The defendant now claims that since this second count was dismissed, it was error for the jury to be allowed to consider all of the evidence. The defendant, however, neither submitted such a request nor took an exception to the charge given by the judge, which charge stated that the second count had been eliminated from the case. "In order properly to preserve for appeal a claimed error in the trial court's charge to the jury, a party must take an exception when

when the charge is given that distinctly states the objection and the grounds therefore." State v. Miller, 186 Conn. 654, 657, 443 A.2d 906 (1982), citing Practice Book §§315, 854, 3060F (c) (1) and (2). "'The purpose of the rule is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials.'" State v. Miller, supra, 658, citing Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). Since the defendant failed to preserve his claim, he cannot now complain that the court should have expanded its instruction.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

ORDER DENYING MOTION TO REARGUE

NO. 953A

STATE OF CONNECTICUT SUPREME COURT

VS. STATE OF CONNECTICUT

JAMES CALLARI SEPTEMBER 26, 1984

O R D E R

THE MOTION OF THE DEFENDANT, FILED AUGUST 29, 1984 FOR PERMISSION TO FILE A MOTION TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY _____
Asst. Clerk-
Appellate

Notice Sent:
EDWARD C. LAVALLE, P.D.
C. ROBERT SATTI, S.A.
NEW LONDON, J.D.
T.C. #10979
DONALD DOWLING
9-27-84

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Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-848

In The

Supreme Court Of The United States

OCTOBER TERM, 1984

JAMES CALLARI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Should this Court consider a petition filed one hundred and twenty-two days after the entry of judgment of the state court of last resort when no timely motion to reargue was filed, and no enlargement of time was granted by this Court?
2. Should this Court consider a petition that does not specify the stage of the proceedings in the state courts at which the federal questions sought to be reviewed were raised, in violation of Rule 21.1(h)?
3. Should this Court review the issue of standing of a person who had been an overnight guest in a home when such claim was not distinctly made to the Connecticut Supreme Court?

4. Should this Court review such claim when Connecticut Supreme Court considered it only collaterally related to the doctrine of collateral estoppal, and in any event affirmed a finding that consent had been given by a co-occupier of the premises?

5. Should this Court review an issue relating to the search of a locked container in such premises, when such claim was not distinctly made to the Connecticut Supreme Court?

6. Should this Court review such a claim, when the finding affirmed by the Connecticut Supreme Court disclosed that the seized contraband was in plain view, and the consent to search the premises would include the right to search containers therein?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED:	i
TABLE OF AUTHORITIES:	v
(a) Cases	v
(b) Rules	v
STATEMENT OF THE CASE:	1
A. PROCEEDINGS	1
B. FACTS OF THE CASE	1
QUESTIONS PRESENTED IN TRIAL AND APPELLATE COURTS	3
REASONS FOR DENIAL OF THE WRIT:	5
I. PETITION FOR WRIT NOT PROCEDURALLY PROPER	5
A. NOT TIMELY FILED	5
B. DOES NOT STATE WHEN ISSUES SOUGHT TO BE REVIEWED WERE FIRST RAISED IN TRIAL AND APPELLATE COURTS	6
II. PRECISE QUESTION SOUGHT TO BE REVIEWED NOT DISTINCTLY RAISED IN LOWER COURTS	7
III. CLAIMS ARE INSUBSTANTIAL ON THEIR MERITS	11

A. DECISION ON FIRST QUESTION IS FACTUAL, HAD ADEQUATE BASIS AND IS ACADEMIC..... 11

B. DECISION ON SECOND QUESTION AS CONSIDERED IS INSUBSTANTIAL ON MERITS.....13

1. APPELLATE COURT CONSIDERED SEIZURE OF EFFECTS..... 13

2. CONTRABAND WAS IN PLAIN VIEW..... 14

3. CONSENT SEARCH OF PREMISES PERMITS SEARCH OF CONTAINERS THEREIN..... 17

CONCLUSION 19

APPENDIX

A - AFFIDAVIT OF PETITIONER..... A-1

B - PETITIONER'S ISSUES ON APPEAL..... B-1

C - ISSUES ON MOTION TO REARGUE..... C-1

TABLE OF AUTHORITIES

Page

(a) Cases

Coolidge v. New Hampshire, 403 U.S. 443, 446, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)..... 15

Robbins v. California, 453 U.S. 470, 102 S. Ct. 2841, 2844-2846 (1981).... 17

Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)... 15

United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 2171 (1981).....16,18

(b) Rules

Revised Rules of the Supreme Court of the United States

Rule 20.1.....5

Rule 21.1 (h).....6

STATEMENT OF THE CASE

A - PROCEEDINGS

The decision of the Connecticut Supreme Court was announced on July 24, 1984. Petitioner personally was aware of such decision on August 4, 1984. On or before August 22, 1984 he contacted present counsel, (Resp. App. p.A-2) who, on August 29, 1984 filed a Motion For Permission To File Motion To Reargue, which Motion for Permission was denied on September 26, 1984 (Pet. App p. 16). No timely (10 days from date of decision) Motion to Reargue had been filed. Present counsel filed subject petition on November 24, 1984. No extension of time was sought in this Court.

B - FACTS OF THE CASE

In addition to the facts set forth

in the petition, respondent adopts the facts set forth in the Connecticut Supreme Court opinion (Pet. App. pp. 8a-14a), specifically pointing out facts which are not contained in the petition:

1) Mrs. Brady, a co-occupier of the house with her husband, invited the police into her home upon answering Sgt. Hurley's knock. She, thereafter orally, and then in writing, consented to the search of the entire house for contraband and evidence of drug dealing.

2) The room in which the suitcase was found was occupied by the Bradys and their child, and there was no proof that petitioner continued to be a guest in that room at the time of the search.

3) Mrs. Brady provided the instrument that Hurley used to open the suitcase.

4) The opened suitcase contained the remaining portion of the previously exposed large plastic baggie and the remaining portion of the contraband in that baggie, as well as seven kilo-bricks of tightly wrapped marijuana (Trans. I, pp.212-222, State's Ex. 5, 6, 7, 8).

QUESTIONS PRESENTED IN TRIAL AND APPELLATE COURTS

Addressing issues germane to this petition, petitioner presented three issues in the trial court. 1) Should collateral estoppal apply? 2) Did he have standing to object to the search of the Brady premises? 3) Was Mrs. Brady's consent voluntary? (Pet. App. pp.14a-19a).In the Appellate Court in his first Preliminary Statement of Issues, he raised only the issue of collateral estop-pal (Resp.App.p.B-1).In his subsequent

Statement, he raised issues of 1) voluntary consent and 2) collateral estoppal. (Resp. App. p.B-1). In his Brief to that court, he addressed 1) collateral estoppal and 2) he then asked "Did the Court err in denying defendant's Motion to Suppress the evidence seized without a warrant and without defendant's consent?" (Resp. App. p. B-2). The body of the brief on this issue related solely to the search of the premises (Resp. App. pp. B-2 - B-5).

The issues set forth by present counsel in the proposed motion to reargue were: 1) Appellate Court did not consider cases which might cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase; 2) Such court did not consider possible denial of counsel (Resp. App.p. C-1).

REASONS FOR DENIAL OF THE WRIT

I.

PETITION FOR WRIT NOT PROCEDURALLY PROPER

A - NOT TIMELY FILED

The Connecticut Supreme Court decision was announced on July 24, 1984. A Motion for Reargument was not timely filed in that court. Subject petition was filed on November 24, 1984. Thus, one hundred twenty-two (122) days passed from the entry of the opinion, over twice the period allowed by the Rules of this Court (R. 20.1). Petitioner has filed no motion for extension of time for a late filing, nor has he sought permission of this Court for such late filing. Present counsel was contacted by petitioner approximately twenty-nine (29) days after the decision, some thirty-one (31) days before the petition was due. The petition is untimely and

review should be denied.

B - DOES NOT STATE WHEN ISSUES SOUGHT TO BE REVIEWED WERE FIRST RAISED IN TRIAL AND APPELLATE COURTS

An examination of the petition discloses a complete failure to specify the stage in the proceedings, either in the trial or appellate courts at which the federal questions sought to be reviewed were raised. As will be argued hereafter, the precise questions sought to be reviewed were not distinctly raised in either the trial or appellate courts. Since petitioner has failed to comply with Rule 21.1(h), this Court cannot determine whether it has jurisdiction to review the judgment on writ of certiorari.

Contrary to petitioner's statement on page 8, he did not claim on appeal that the warrantless opening of his suitcase violated his Fourth Amendment

rights.

II

PRECISE QUESTIONS SOUGHT TO BE REVIEWED NOT DISTINCTLY RAISED IN LOWER COURTS

In the trial court, petitioner claimed the doctrine of collateral estoppal applied, and all the seized evidence should be suppressed. The court denied such claim. The prosecutor then claimed petitioner had to establish his standing before evidence on the substance of the motion should be heard. The court overruled such claim and ordered the hearing to proceed. Thereafter, the sole claim of petitioner was that there was no voluntary consent given by Mrs. Brady to search the premises.

In the appellate court, in his Preliminary Statement of Issues, as amended, he claimed the trial court erred: 1) In finding consent to search

was voluntarily given and 2) In failing to apply the doctrine of collateral estoppal (Resp. App. p. B-1). In his Brief he claimed error 1) In failing to apply the doctrine of collateral estoppal and 2) In denying the Motion to Suppress evidence seized without a warrant and without defendant's consent. An examination of the entire portion of the brief relating to this second issue discloses that it related solely to a search of the premises (not the container) (Resp. App. pp. pp. B-2-B-5).

In neither court was the distinct issue raised by petitioner that, even if the police had the right to seize the container, they had no right to search its interior. In neither court was the "plain view" exception to the warrant requirement raised, briefed or addressed by petitioner.

Present counsel, in her proposed Motion to Reargue set forth two claims. The second related to an alleged deprivation of counsel - an issue never even hinted at in the trial or appellate court. The first generally alleged a lack of presentation to and consideration by the appellate court of case law that evolved since the trial and original briefing. She claimed such decisions "would cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase." This claim certainly does not precisely state Question 2 of the petition, and it was not earlier raised in the appellate court. The inclusion of such new issue by present counsel was an attempt to raise it (for the first time) before the appellate court, so that it might become the subject

of this petition.

Although the first Question Presented was never precisely raised in the lower court or the appellate court, Statement of Issues, it was, in a sense, touched upon in petitioner's Brief in the appellate Court. Because it had not been specifically raised, the appellate court considered it only on the collateral issue of whether the trial court erred in refusing to apply the doctrine of collateral estoppal to all the evidence seized - the issue that was distinctly raised. In finding no error, the appellate court held that that doctrine wouldn't apply because this petitioner did not have the same standing as Brady to complain about the search of the premises.

Since neither question sought to be raised by this petitioner was distinctly raised and/or passed upon

by either the trial or appellate courts, they should not be considered for review by this Court.

III

CLAIMS ARE INSUBSTANTIAL ON THEIR MERITS

A - DECISION ON FIRST QUESTION IS FACTUAL, HAD ADEQUATE BASIS AND IS ACADEMIC

In the event this Court were to find no jurisdictional barriers to reviewing the first question, it should decline review on the ground that the issue is insubstantial on its merits. Petitioner states his first question as relating to the standing of a guest in a home to challenge the warrantless search of that home (See Pet. p.10). The Connecticut Supreme Court first held that defendant bears the burden of presenting proof to establish standing, critical to which was proof that he had a legitimate expectation of privacy

in the premises searched. It then in effect held that, based on the evidence, he had not proven such privacy expectation. The court pointed out he had been at most a social guest, who had slept in the room prior to his arrest, and there was no evidence that he was still a guest in that room during the early morning of the search of the premises (Pet. App. pp.16a-17a). The court did not hold that, as a matter of law, a current guest in a home, thought not then on the premises, has no expectation of privacy in the room he currently occupies, and thus lacks standing to challenge a search of that room. Such is the question petitioner seeks to have this court answer.

It should be remembered, Mrs. Brady (at least the co-occupier of the room) voluntarily consented to the search of

that room.

Finally, it should be noted that even though the appellate court found no equivalent standing to contest the search of the premises in deciding the issue of collateral estoppal, it nevertheless considered the critical issue of petitioner's right to object to the seizure of his effects, finding he had some expectation of privacy as to them (Pet. App. pp. 17a-18a). Thus, this ruling of the appellate court is, in a sense, academic since it did recognize standing in the petitioner to be heard on the issue of the alleged unconstitutional seizure of his effects.

B - DECISION ON SECOND QUESTION AS CONSIDERED, IS INSUBSTANTIAL ON MERITS

(1) Appellate Court Considered Seizure of Effects.

If this court finds no jurisdictional

barrier to reviewing the second question, it should decline review on the ground that the particular issue, as considered by the appellate court, is insubstantial on its merits. Though not distinctly raised by petitioner, the appellate court gave some consideration to the subject matter of the seizure of petitioner's effects. It should be remembered Sgt. Hurley did not know the suitcase was petitioner's until after he opened it, with Mrs. Brady's assistance (Pet. App. p. 11a). That court did not consider the specific question of the search of those effects because it had not been precisely presented in the trial court or in that court.

(2) Contraband Was In Plain View

The facts in the instant case are clearly distinguishable from the facts in the cases cited by petitioner in

support of his claim. In this case a portion of the clear plastic baggie containing a portion of the contraband therein was sticking out of the suitcase. It was in the plain view of Sgt. Hurley, who was legitimately on the premises. He initially was searching for other persons who might be involved in the illegal drug activities, and then for evidence against Brady. He inadvertently came across evidence that later proved to be incriminating to this petitioner. He thus had the right to seize such evidence. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L. Ed. 2d 564 (1971); Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1975) L. Ed 2d 502 (1983). If the seizure of such evidence required the opening of the suitcase to accomplish it, such action by the police would

not violate the purposes of the Fourth Amendment. Certainly if the unexposed portion of the clear plastic baggie containing marijuana were in a brown paper bag, the police would have the right to extract the entire baggie and its contents from the container. The distinction between "worthy" and "unworthy" containers is foreclosed by the central purpose of the Fourth Amendment. United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 2171 (1981). In Ross, at page 2167 n. 19, this Court pointed out that not all packages and containers found by the police during the course of a search deserve the full protection of the Fourth Amendment.

Some containers by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appear-

ance. Here, the police, at the very least, could infer that the interior of the suitcase contained contraband, because the exterior part that was visible was connected to the interior part of the baggie and contraband that was not then visible to the naked eye. If a container proclaims its contents by its distinctive configuration or otherwise, and thus allows by its outward appearance an inference to be made of its contents, those contents are similarly considered to be in plain view. Robbins v. California, 453 U.S. 470, 102, S. Ct 2841, 2844-2846 (1981).

(3) Consent Search Of Premises Permits Search of Containers Therein

Even absent the fact that the contraband was sticking out of the suitcase, the police having prior consent to search the premises, would have the right to

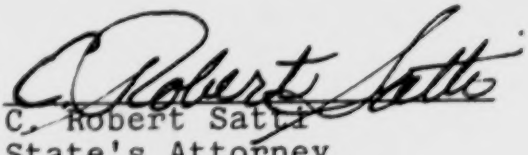
open the suitcase and examine its contents just as they have the right to open closets, chests, drawers and other containers. A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found. Nice distinctions between closets, drawers and containers in the case of a home must give way to the interest in the prompt and efficient task at hand. This rule applies equally to all containers. A container that may conceal the object of a search authorized by a warrant may be opened immediately. The scope of a warrantless search is the same as would be authorized by a warrant; only the approval of the magistrate is waived. United States v. Ross, supra 102 S. Ct at 2170-2172. Mrs. Brady consented to search the entire premises for contraband. She even assisted

in the opening of the container by providing the instrument used.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully Submitted,

by: 

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NO. 84-848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAMES CALLARI,
Petitioner

V.

STATE OF CONNECTICUT
Respondent

APPENDIX TO

BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI TO
THE CONNECTICUT SUPREME COURT

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Counsel for Respondent

AFFIDAVIT OF JAMES CALLARI

STATE OF CONNECTICUT)
) SS: New Haven
COUNTY OF NEW HAVEN) August 27,1984

I, James Callari, having been duly sworn according to law deposes and states:

1. I am the defendant in the case of State v. Callari, (9538) 194 Conn 18, decided by this Court on July 24, 1984.

2. I received the letter annexed hereto as Exhibit A on Saturday, August 4, 1984, as can be seen from the post-marks on the envelope annexed hereto as Exhibit B.

3. I reached Mr. Lavallee, the public defender who handled my appeal by telephone on Wednesday, August 8, 1984.

4. At that time Mr. Lavallee did not inform me that the time for me to

file a motion to reargue my case in the Supreme Court of the State of Connecticut had already passed.

5. I consulted the law firm of Williams and Wise on August 22, 1984, and that was the first that I heard that a ten day limitation might foreclose any opportunity I had to reargue my appeal in this court.

/s/ James Callari
JAMES CALLARI

Subscribed and sworn to before me, this 27th day of August, 1984.

/s/ Sue L. Wise
Sue L. Wise
Commissioner of
Superior Court

PRELIMINARY STATEMENT OF ISSUES

The defendant intends to present the following issues on appeal:

2. Did the trial court err in its failure to apply the prior order in STATE V. BRADY to identical facts in the instant Motion to Suppress?

Filed March 28, 1979 (Atty. Sidor)

* * * *

PRELIMINARY STATEMENT OF ISSUES

1. Did the court err in denying the defendant's Motion to Suppress, finding that a consent to search was voluntarily given?

2. Did the Court err in failing to apply the doctrine of Collateral Estoppel, on defendant's Motion to Suppress?

Filed Sept. 21, 1982 (Atty.Lavallee)

CONNECTICUT SUPREME COURT
APPELLANT'S BRIEF

ISSUES

1. Did the court err in failing to apply the doctrine of Collateral Estoppel to the defendant's Motion to Suppress?.....p.

2. Did the court err in denying defendant's Motion to Suppress the evidence seized without a warrant and without defendant's consent?.....p.

* * * *

ARGUMENT

II

The court erred in failing to suppress the evidence seized, in the room occupied by the defendant, without a warrant and without his permission.

The Fourth Amendment to the Constitution of the United States is applied to the states through the Fourteenth Amendment, State v. Jackson,

162 Conn. 440; 294 A 2nd 517, Cert. Denied, 409 U.s. 876, provides that the "Right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures shall not be violated..."

Our courts have held that since the State Constitutional provision Article 1, Section 7 is couched in the same language as the Federal Constitutional Amendment, it should be accorded the same interpretation. Ajello v. Hartford Federal Savings & Loan Assoc. 32 Conn. Supp. 198, Connecticut General Statutes Section 54-33 (F).

It is well established that a search without a warrant is per se unreasonable, subject to certain narrowly defined exceptions Katz v. United States, 389 U.S. 347; Chimel v. California,

395 U.S. 752.

In the present circumstance, the State alleges that the search of defendant's room was consented to and that this consent satisfied the requirements of a warrantless search.

In United States v. Matlock, 415 U.S. 164; 39 L. Ed. 2nd 242, 94 S. Ct. 988, the court indicates that the "Consent" of one who possesses common authority over premises or effects is valid against the non-consenting person with whom that authority is shared. That the consent of one may be sufficient to waive the Fourth Amendment expectation of privacy, but the court has never extended that waiver to a third party. Chapman v. United States, 365 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2nd 856. Bumper v. North

Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2nd 797.

Even if Mrs. Brady had been arrested following the discovery of contraband, there is a serious question that the search of the entire home would have been justified. Chimel v. California, supra.

(Brief filed by Atty. Lavallee).

MOTION TO REARGUE *

1. This Court was not presented with nor did it consider case law which has evolved since the trial and original briefing of this matter. Such decisions which would cast doubt on the efficacy of the warrantless search of the Brady home and the Callari suitcase, include, but are not limited to: Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980);... (other cases cited).

2. In deciding whether collateral estoppel should govern the suppression of evidence in this matter, this Court did not consider that Callari was denied counsel at critical stages of the proceedings. ...

Dated August 28, 1984 (Atty. Wise)

.....

* Proposed (Permission for late filing denied).